(9)

No. 03-221

IN THE SUPREME COURT OF THE UNITED STATES

CHERYL K. PLILER, Warden of California State Prison—Sacramento, *Petitioner,*

v.

RICHARD HERMAN FORD, *Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF ON THE MERITS

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TABLE OF CONTENTS

	Page
REPLY BRIEF	1
I. ADVISEMENTS DESIGNED TO PROMOTE STAY AND ABEYANCE OF MIXED PETITIONS ARE INCOMPATIBLE WITH *ROSE v. LUNDY* AND AEDPA	1
A. The Propriety Of Advisements Regarding Stay And Abeyance Must Be Evaluated By Reference To The Procedure Of Stay And Abeyance Itself	1
B. *Rose v. Lundy* Requires Dismissal Of Mixed Petitions	3
C. AEDPA Retains *Rose*'s Exhaustion Requirement	6
D. Neither *Rose v. Lundy* Nor AEDPA Contemplates A Stay Of Federal Habeas Proceedings Pending Exhaustion Of Dismissed Claims	6
E. AEDPA's One-Year Limitation Period, Coupled With *Rose*'s Exhaustion Rule, Does Not Unreasonably Impair A Petitioner's Right To Seek Relief	10
F. *Rose v. Lundy* Does Not Require District Courts To Provide Advisements Prior To Dismissal Of Mixed Petitions	12

TABLE OF CONTENTS (continued)

	Page
II. "RELATION BACK," AS SET FORTH IN RULE 15(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, WOULD CONTRAVENE AEDPA IN HABEAS CASES	15
A. Rule 15(c) Is Not Applicable To Habeas Proceedings	15
III. REMAND FOR RECONSIDERATION OF EQUITABLE TOLLING IS UNWARRANTED	17
A. The Ninth Circuit Did Not Rely Upon Equitable Tolling To Reach Its Holding	17
B. Reversal Would Render The Panel's Dicta Regarding Equitable Tolling Moot	18
C. Equitable Tolling May Not Be Applied To The AEDPA Limitation Period	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases	Page
Banks v. Dretke, 124 S. Ct. 1256 (2004)	16
Bowen v. Roe, 188 F.3d 1157 (CA9 1999)	10
Calderon v. Thompson, 523 U.S. 538 (1998)	8
Carey v. Saffold, 536 U.S. 214 (2002)	14
Caspari v. Bohlen, 510 U.S. 383 (1994)	10
Castille v. Peoples, 489 U.S. 346 (1989)	4, 11
Castro v. United States, 124 S. Ct. 786 (2003)	2, 13, 15
Clark v. Tansy, 13 F.3d 1407 (CA10 1993)	4
Coleman v. Thompson, 501 U.S. 722 (1991)	4, 11
Crews v. Horn, 360 F.3d 146 (CA3 2004)	9

TABLE OF AUTHORITIES (continued)

	Page
David v. Hall, 318 F.3d 343 (CA1 2003)	19
Deakins v. Monaghan, 484 U.S. 193 (1988)	8
Diaz v. Sec'y for Dep't of Corr., No. 02-10114, 2004 U.S. App. LEXIS 4587 (CA11 Mar. 10, 2004)	14
Duncan v. Walker, 533 U.S. 167 (2001)	1, 8, 9, 16
Engle v. Isaac, 456 U.S. 107 (1982)	4
Felker v. Turpin, 518 U.S. 651 (1996)	7, 12
Freeman v. Page, 208 F.3d 572 (CA7 2000)	9
In re Blodgett, 502 U.S. 236 (1992)	5, 7
James v. Pliler, 269 F.3d 1124 (CA9 2001)	3
Jones v. Morton, 195 F.3d 153 (CA3 1999)	17

TABLE OF AUTHORITIES (continued)

	Page
Kelly v. Small, 315 F.3d 1063 (CA9 2003)	3, 8
Lampf v. Gilbertson, 501 U.S. 350 (1991)	19, 20
Lonchar v. Thomas, 517 U.S. 314 (1996)	4, 10, 19
Lorillard v. Pons, 434 U.S. 575 (1978)	6
Marsh v. Soares, 223 F.3d 1217 (CA10 2000)	17
McCleskey v. Zant, 499 U.S. 467 (1991)	11
Mitchell v. Esparza, 124 S. Ct. 7 (2003)	16
Neverson v. Bissonnette, 261 F.3d 120 (CA1 2001)	17
Newell v. Hanks, 283 F.3d 827 (CA7 2002)	17
Nyland v. Moore, 216 F.3d 1264 (CA11 2000)	17
Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505 (1991)	1

TABLE OF AUTHORITIES (continued)

	Page
Ortberg v. Moody, 961 F.2d 135 (CA9 1992)	4
Pessotti v. Eagle Mfg. Co., 946 F.2d 974 (CA1 1991)	17
Rose v. Lundy 455 U.S. 509 (1982)	2-4, 6, 7, 9-13, 15
Slack v. McDaniel, 529 U.S. 473 (2000)	4, 12, 15
Slayton v. Smith, 404 U.S. 53 (1971)	4, 5, 7
Stewart v. Martinez-Villareal, 523 U.S. 637 (1998)	12
Taliani v. Chrans, 189 F.3d 597 (CA7 1999)	19
Teague v. Lane, 489 U.S. 288 (1989)	4
United States v. Beggerly, 524 U.S. 38 (1998)	18-20
United States v. Brockamp, 519 U.S. 347 (1997)	19
United States v. Hasting, 461 U.S. 499 (1983)	2

TABLE OF AUTHORITIES (continued)

	Page
Vance v. Terrazas, 444 U.S. 252 (1980)	1
Wainwright v. Sykes, 433 U.S. 72 (1977)	11
Warren v. Garvin, 219 F.3d 111 (CA2 2000)	17
Williams v. Taylor, 529 U.S. 420 (2000)	6, 7
Wilton v. Seven Falls Co., 515 U.S. 277 (1995)	8
Statutes	
15 U.S.C. § 78j(b)	19
28 U.S.C. § 2242	16
28 U.S.C. § 2244(b)(1)	7
28 U.S.C. § 2244(b)(2)	11
28 U.S.C. § 2244(d)(1)	10, 12
28 U.S.C. § 2244(d)(1)(B)	19
28 U.S.C. § 2244(d)(1)(C)	19
28 U.S.C. § 2244(d)(1)(D)	19

TABLE OF AUTHORITIES (continued)

	Page
28 U.S.C. § 2244(d)(2)	1, 19
28 U.S.C. § 2254	14
28 U.S.C. § 2254(b)(1)(A)	6
28 U.S.C. § 2254(b)(3)	16
28 U.S.C. § 2409a	18
Court Rules	
Fed. R. App. P. 47(b)	2
Rule 9(b), 28 U.S.C. § 2254 Cases	7
Rule 11, 28 U.S.C. § 2254 Cases	15
Rule 15(b), 28 U.S.C. § 2254 Cases	16
Rule 15(c), 28 U.S.C. § 2254 Cases	15-17
Sup. Ct. R. 14.1(a)	1
Sup. Ct. R. 15.2	2
Other Authorities	
141 Cong. Rec. S4590 (daily ed. Mar. 24, 1995)	10
141 Cong. Rec. S7847 (daily ed. June 7, 1995)	6

REPLY BRIEF

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) allows a prisoner with unexhausted claims to toll the one-year limitation period during the pendency of state post-conviction or other collateral applications, but not during the pendency of a federal habeas proceeding. *See* 28 U.S.C. § 2244(d)(2); *Duncan v. Walker*, 533 U.S. 167, 178-79 (2001). This case presents the question whether a federal habeas petitioner who purposely disregards AEDPA's tolling provision and files admittedly mixed petitions in federal court should be rewarded by having his otherwise time-barred claims considered on their merits.

I.

ADVISEMENTS DESIGNED TO PROMOTE STAY AND ABEYANCE OF MIXED PETITIONS ARE INCOMPATIBLE WITH *ROSE v. LUNDY* AND AEDPA

A. The Propriety Of Advisements Regarding Stay And Abeyance Must Be Evaluated By Reference To The Procedure Of Stay And Abeyance Itself

Respondent Ford contends that "the validity of the Ninth Circuit's stay procedure is not among the questions presented in the petition for certiorari." Resp't Br. 11. The validity of stay and abeyance, however, is properly before this Court, for it lies clearly within the call of the first question presented in the Warden's certiorari petition. *See* Sup. Ct. R. 14.1(a) (the "statement of any question presented is deemed to comprise every subsidiary question fairly included therein"); *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991); *Vance v. Terrazas*, 444 U.S. 252, 258 n.5 (1980) (when "resolution of [a question of law] is an essential, or at least an advisable, predicate to an intelligent resolution" of the question on which certiorari was granted, it can be regarded as "fairly comprised" within it). That question asked whether

the dismissal of a "mixed" petition is improper absent advisements regarding stay and abeyance. The propriety of such advisements, in turn, must be evaluated by reference to what they were designed to promote. Certainly, if stay and abeyance is invalid, then warnings designed to effectuate it need not be given.

And, indeed, they should not be given. In *United States v. Hasting*, 461 U.S. 499, 505-06 (1983), this Court observed that there are three basic purposes served by advisements required of federal district courts: "[T]o implement a remedy for violation of recognized rights; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury; and finally, as a remedy designed to deter illegal conduct." *Id.* at 505 (citations omitted); *see also Castro v. United States*, 124 S. Ct. 786 (2003); Fed. R. App. P. 47(b). The advisements required by the Ninth Circuit do not implicate any of the purposes recognized by this Court in *Hasting*, but instead promote a procedure that contravenes both *Rose v. Lundy* and AEDPA.

Moreover, the Warden plainly argued against the propriety of stay and abeyance in her petition for writ of certiorari, to which no objection was made in the brief in opposition. As set forth in Rule 15.2 of the Rules of the Supreme Court of the United States, "[a]ny objection to consideration of a question presented based on what occurred in the proceedings below, if the objection does not go to jurisdiction, may be deemed waived unless called to the Court's attention in the brief in opposition." *See* Sup. Ct. R. 15.2. Ford's belated objection to the scope of the questions presented should be deemed waived, as his objection "does not go to jurisdiction." *See id.* ("[T]he brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted").

Despite Ford's assertion that the Ninth Circuit panel merely "left the district court with the *discretion* to [stay the petitions]," Resp't Br. 11 (emphasis in original), the panel made

clear that "the discretion is more a matter of form than substance, and a *denial of the request would likely constitute error*." Pet. App. A26 (emphasis added). In *Kelly v. Small*, 315 F.3d 1063 (CA9 2003), a decision relied upon by the majority in this case, the Ninth Circuit similarly concluded that a district court *abuses* its discretion in *not* staying a petition pending exhaustion of state remedies: "[W]e join the 'growing consensus' in recognizing the clear appropriateness of a stay when valid claims would otherwise be forfeited." *Id.* at 1070; *see also James v. Pliler*, 269 F.3d 1124, 1126-27 (CA9 2001) ("[T]he district court erred in dismissing James' petition without providing him with a meaningful opportunity to amend"). Thus, where a motion to stay has been filed in a case governed by AEDPA, a district court's application of stay and abeyance is little more than a foregone conclusion.

B. *Rose v. Lundy* Requires Dismissal Of Mixed Petitions

1. Ford argues that, under *Rose v. Lundy*, "a prisoner who files a mixed petition is faced with a choice. If he wishes to proceed in federal court on his exhausted claims, then unexhausted claims will be purged from the petition so that he can do so." Resp't Br. 7; *see also id.* at 16; NACDL Amicus Br. 11 ("The State's position [regarding complete dismissal of mixed petitions] is flatly foreclosed by *Rose*"). Not so. In fact, the majority in *Rose* contemplated the deletion of unexhausted claims only *after* the dismissal of a mixed petition: "[W]e hold that a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510.

Indeed, at the conclusion of its opinion, the majority reiterated that "a district court *must* dismiss habeas petitions containing both unexhausted and exhausted claims." *Rose v. Lundy*, 455 U.S. 509, 522 (1982) (emphasis added). This Court has repeatedly reaffirmed that *Rose v. Lundy* requires the

complete dismissal of petitions containing any unexhausted claims. *See, e.g.*, *Slack v. McDaniel*, 529 U.S. 473, 486-88 (2000) (Kennedy, J.) ("*Rose v. Lundy* dictated that, whatever particular claims the [mixed] petition contained, none could be considered by the federal court"); *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) (Breyer, J.); *Coleman v. Thompson*, 501 U.S. 722, 731 (1991) (O'Connor, J.); *Castille v. Peoples*, 489 U.S. 346, 349 (1989) (Scalia, J.); *Teague v. Lane*, 489 U.S. 288, 325 (1989) (Stevens, J., concurring) ("In *Rose v. Lundy*, * * * the Court announced that a habeas petition containing exhausted and unexhausted claims must be dismissed"); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) (O'Connor, J.); *see also Clark v. Tansy*, 13 F.3d 1407, 1409 (CA10 1993) (Under *Rose v. Lundy*, "the district court must dismiss the [mixed] petition, giving the petitioner the choice of re-filing a petition containing solely the exhausted claims * * *, or delaying his habeas petition altogether pending the exhaustion of all his claims"); *Ortberg v. Moody*, 961 F.2d 135, 137 (CA9 199 ("The district court properly dismissed the [mixed] petitio).

Ford appears to conflate the ma ity's holding with the plurality's suggestion that a habe petitioner may avoid outright dismissal of his mixed petition if he "proceed[s] only with his exhausted claims and deliberately sets aside his unexhausted claims * * *." *Rose v. Lundy*, 455 U.S. at 521. The majority, however, did not adopt that suggestion, *see id.* at 510-20, 522, nor has a majority of this Court *ever* held that *Rose v. Lundy* contemplates such a procedure. In fact, Justice O'Connor, who authored the majority and plurality opinions in *Rose v. Lundy*, subsequently reiterated in *Coleman v. Thompson*, 510 U.S. at 731, that "[t]his Court has long held that a state prisoner's federal habeas petition should be dismissed if the prisoner has not exhausted available state remedies as to *any* of his federal claims." (Emphasis added).

2. The stay of mixed petitions is also precluded. In *Slayton v. Smith*, 404 U.S. 53 (1971) (*per curiam*), a case which pre-dates *Rose v. Lundy*, this Court rejected the lower court's

stay of a mixed habeas petition pending exhaustion of state remedies:

> * * * [A]bsent special circumstances, cf. *Nelson v. George*, 399 U.S. 224 (1970), *Wade v. Wilson*, 396 U.S. 282 (1970), rather than ordering retention of the case on the District Court's docket, the Court of Appeals should simply have vacated the judgment of the lower court and directed dismissal of the petition for failure to exhaust state remedies.

Id. at 53-54; *see also id.* (remanding for further proceedings consistent with the opinion).

More recently, in *In re Blodgett*, 502 U.S. 236 (1992) (*per curiam*), this Court chastised the Ninth Circuit over its lengthy stay of a federal habeas proceeding:

> * * * The orders by the Ninth Circuit to vacate submission of the case until completion of the state collateral proceeding and then to hold the case in abeyance pending filing and resolution of the third federal habeas proceeding in the District Court raise the very concerns regarding delay that were part of the rationale for this Court's decision[] in *Rose v. Lundy*.

Id. at 239.[1]

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1. Under stay and abeyance, capital habeas proceedings filed in federal courts in California have been subject to considerable delays pending exhaustion of state-court remedies. In *Reno v. Woodford*, CV 96-2768, currently pending in the Central District of California, the district court issued a stay of the federal habeas proceeding on May 7, 1999, ostensibly to permit the petitioner to file his unexhausted claims in the California Supreme Court. To date, almost five years later, no state-court exhaustion petition has been filed.

C. AEDPA Retains *Rose*'s Exhaustion Requirement

AEDPA incorporates the statutory exhaustion requirement interpreted by *Rose v. Lundy* and its progeny. *See* 28 U.S.C. § 2254(b)(1)(A). This was no accident. Senator Arlen Specter, a proponent of AEDPA, observed during discussions of the bill that "state prosecutors and the attorneys general * * * disagree[d] with [proposals to eliminate the exhaustion requirement from AEDPA]," and noted that the requirement had consequently been retained. 141 Cong. Rec. S7847 (daily ed. June 7, 1995); *see also id.* (statement of Sen. Specter) ("[T]his bill does not abolish [the] exhaustion requirement").

In *Lorillard v. Pons*, 434 U.S. 575 (1978), this Court observed that "where * * * Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute." *Id.* at 581; *see also Williams v. Taylor*, 529 U.S. 420, 434 (2000) (quoting *Lorillard v. Pons*). As such, AEDPA's statutory exhaustion requirement must be interpreted in a way that is "respectful of Congress and of [this] Court's own processes," and with "the same meaning [as applied by *Rose v. Lundy* to AEDPA's statutory predecessor] in the absence of specific direction to the contrary." *Williams v. Taylor*, 529 U.S. at 434.

D. Neither *Rose v. Lundy* Nor AEDPA Contemplates A Stay Of Federal Habeas Proceedings Pending Exhaustion Of Dismissed Claims

1. Even if it were assumed that *Rose v. Lundy* may be interpreted as permitting the deletion of unexhausted claims as an alternative to outright dismissal of a mixed petition, a stay of the purged petition pending exhaustion of the deleted claims would be impermissible. The *Rose* plurality anticipated that purged petitions would be decided expeditiously, in warning that "a prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks

dismissal of subsequent federal petitions" under Rule 9(b) of the Rules Governing Section 2254 Cases. 455 U.S. at 521.

As explained in the Warden's Brief on the Merits, stay and abeyance allows a habeas proceeding to be placed "on hold" indefinitely pending a petitioner's pursuit of state-court remedies. A stay of federal habeas proceedings would thus render Rule 9(b)'s prohibition against second or successive petitions largely irrelevant, by allowing deleted claims to be added back to the stayed petition following exhaustion; such claims would *never* constitute second or successive applications. Ford's interpretation of *Rose v. Lundy* would render the plurality's admonition almost nonsensical. AEDPA codifies Rule 9(b)'s prohibition in § 2244(b)(1), which provides that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." *See Felker v. Turpin*, 518 U.S. 651, 664 (1996) ("The added restrictions which [AEDPA] places on second habeas petitions * * * do not amount to a 'suspension' of the writ contrary to Article I, § 9 ").

2. Ford nevertheless asserts that "district courts have the inherent authority to issue stays in proceedings before them," Resp't Br. 16, and that AEDPA's failure specifically to prohibit stay and abeyance "evinces an intent to permit district courts to stay a mixed petition pending exhaustion." *Id.* at 12. Ford is mistaken on both points. First, as set forth previously, this Court has disapproved of stays of federal habeas petitions. *See Slayton v. Smith*, 404 U.S. at 53-54; *In re Blodgett*, 502 U.S. at 239; *Rose v. Lundy*, 455 U.S. at 521; *see also* 28 U.S.C. § 2244(b)(1).

Second, in drafting AEDPA, Congress presumably was aware of this Court's disapproval. *See Williams v. Taylor*, 529 U.S. at 434. As such, the fact that Congress did not create a "laundry list" of prohibited practices may not be regarded as tacit agreement with a procedure that had been repeatedly rejected by this Court and which, as argued above, would be

inconsistent with AEDPA's statutory design.[2] *Cf. Calderon v. Thompson*, 523 U.S. 538, 554 (1998) ("Although the terms of AEDPA do not govern this case, a court of appeals must exercise its discretion in a manner consistent with the objects of the statute").

3. Contrary to Ford's contention that a stay of a federal habeas petition would not have "the same effect as would tolling [of] AEDPA's statute of limitations," Resp't Br. 18, the only purpose of stay and abeyance is to bypass AEDPA's limitation period by re-incorporating previously-dismissed but newly-exhausted claims. Stay and abeyance is thus functionally indistinguishable from tolling during the pendency of federal habeas proceedings — contrary to this Court's holding in *Duncan v. Walker*, 533 U.S. at 178-79 — and validates the consideration of otherwise time-barred claims. *See Kelly v. Small*, 315 F.3d at 1070. Stated somewhat differently, without tolling, stay and abeyance would serve no useful purpose. Ford appears to acknowledge this by contending "a stay is called for precisely because it would avoid what otherwise would be a statute-of-limitations problem." Resp't Br. 19.

Ford claims, however, that "[t]he premise that stay and abeyance will lead to vexatious litigation is unlikely for the * * * reason that AEDPA was expressly designed to deter

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2. Amicus NACDL argue that this Court has approved of stays of federal actions in favor of parallel state proceedings to enable the federal actions to proceed without the risk of a time bar. NACDL Amicus Br. 16. Yet the decisions relied upon by amicus — *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995), and *Deakins v. Monaghan*, 484 U.S. 193 (1988) — involved *non-habeas proceedings* (actions for declaratory relief, and for damages and attorney's fees, respectively), where *dismissals* of the federal actions were contemplated upon resolution of the pending state-court actions. Stays of the federal actions were available merely to ensure that the federal actions would go forward in the event "the state case[s], for any reason, fail[ed] to resolve the matter[s] in controversy." *Wilton v. Seven Falls Co.*, 515 U.S. at 288 n.2. And, neither case was subject to exhaustion of state-court remedies as a pre-condition to filing in federal court. The decisions relied upon by amicus NACDL are therefore inapposite.

such abuse." Resp't Br. 21. Ford maintains that "[t]he prisoner who chooses to go into federal court with unexhausted claims runs the risk the district court will simply deny those claims on the merits, thereby subjecting any subsequent petition the petitioner may attempt to file to the extremely rigorous second or successive application requirements contained in § 2244(b)." *Id.* at 22. Ford further argues — without any apparent hint of irony — that "no prisoner with even the most rudimentary understanding of habeas procedure" would do such a thing. *Id. Yet that is precisely what Ford did here.*

Ford filed *admittedly* mixed petitions in the 1997 Weed and Loguercio Cases, and concomitantly moved to stay the proceedings pending exhaustion of state remedies. *See* J.A. 48-49, 56-57, 73-78. Under stay and abeyance, a petitioner like Ford would never be subject to AEDPA's prohibition against the filing of second or successive applications because, as stated previously, he could re-incorporate his dismissed but newly-exhausted claims into the *stayed* petition; in other words, failure to comply with *Rose v. Lundy*'s total exhaustion rule would no longer require the re-filing of dismissed claims by way of a second or successive application. And, as amicus NACDL point out, *see* NACDL Amicus Br. 14, at least two circuit courts of appeals now authorize the stay of mixed petitions *in their entirety*, in clear contravention of *Rose v. Lundy*, as well as AEDPA's successive-filing provision. *See, e.g., Crews v. Horn*, 360 F.3d 146, 154 (CA3 2004); *Freeman v. Page*, 208 F.3d 572, 576 (CA7 2000).

Stay and abeyance renders AEDPA's limitation period, as well as its prohibition against the filing of second or successive applications, "insignificant, if not wholly superfluous." *Duncan v. Walker*, 533 U.S. at 174. As this Court stated in construing AEDPA's state collateral-application tolling provision, "We are * * * 'reluctan[t] to treat statutory terms as surplusage' in any setting." *Id.* (citations omitted). The Ninth Circuit's interpretation of AEDPA, in contrast, ignores this Court's admonition and "guts" pivotally-important statutory provisions.

E. AEDPA's One-Year Limitation Period, Coupled With *Rose*'s Exhaustion Rule, Does Not Unreasonably Impair A Petitioner's Right To Seek Relief

AEDPA imposes a one-year limitation period upon the filing of federal habeas petitions following the finality of a state criminal conviction. *See* 28 U.S.C. § 2244(d)(1); *see also* 141 Cong. Rec. S4590 (daily ed. Mar. 24, 1995) (statement of Sen. Specter) (referring to "basic building blocks of habeas corpus reform," including the establishment of "time limits on filing habeas corpus petitions"); *Lonchar v. Thomas*, 517 U.S. at 333-34 (documenting bills proposing "a statute of limitations for federal habeas corpus petitions" over a ten-year period).

The Ninth Circuit has concluded that, absent statutory tolling, AEDPA's one-year limitation period commences with the California Supreme Court's denial of review (or decision on the merits), plus ninety days, which takes into account the time within which a petition for writ of certiorari may be filed. *See Bowen v. Roe*, 188 F.3d 1157, 1159-60 (CA9 1999); *see also Caspari v. Bohlen*, 510 U.S. 383, 390 (1994). As Senator Specter noted:

> [AEDPA's] abbreviated timetable does not take effect until State court review of a sentence • • • is completed. No time limit is placed by this legislation on the length of trial or on periods for consideration of post-trial motions and the State court appeals. During that period, most, if not all, of the complex factual and legal issues will be organized, analyzed and resolved by the State courts, so that these issues will not be novel when the case goes to Federal court.

141 Cong. Rec. S4590 (daily ed. Mar. 24, 1995).

Ford nevertheless contends that AEDPA's limitation period, coupled with *Rose v. Lundy*'s total exhaustion rule, improperly deprived him of the ability to have any re-filed claims addressed, purportedly because the district court's

"'dismissal without prejudice' [was] substantively transformed into a 'dismissal with prejudice'" as a result of the presumptive expiration of AEDPA's limitation period. Resp't Br. 14. Yet as the dissent below astutely observed:

> Dismissal without prejudice was not the equivalent of a dismissal with prejudice. Ford was perfectly free to re-file. If thereafter, the statute of limitations had been raised as an affirmative defense, Ford then would have been entitled to assert whatever factual, statutory, and equitable defenses to the statute of limitations he might have had. And if the statute of limitations had not been raised, it would have been waived.

Pet. App. A42 (Silverman, J., dissenting).

Indeed, *Rose v. Lundy* appears to suggest that a total exhaustion rule will not "unreasonably impair the [petitioner's] right to relief," 455 U.S. at 522, as long as the petitioner is allowed to *re-file* his claims following the dismissal of a mixed petition; *Rose* does not require that re-filed claims be considered on the *merits*. Even before the enactment of AEDPA, re-filed claims could be summarily denied in federal court where, for example, the claims had been procedurally defaulted in state court on "independent and adequate" state-law grounds. *See, e.g., Coleman v. Thompson*, 501 U.S. at 731-32; *Castille v. Peoples*, 489 U.S. at 351-52; *Wainwright v. Sykes*, 433 U.S. 72, 81, 87 (1977); *see also Rose v. Lundy*, 455 U.S. at 521 (plurality opn.) ("[A] prisoner who decides to proceed only with his exhausted claims and deliberately sets aside his unexhausted claims risks dismissal of subsequent federal petitions"); *cf. McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (allowing relief from procedural default based upon a showing of cause and prejudice); 28 U.S.C. § 2244(b)(2).

The possibility that a claim *might* be time-barred under AEDPA upon re-filing in a particular case does not, by itself,

constitute an "unreasonabl[e] impair[ment]" of a petitioner's right to relief. AEDPA does not impose a "blanket" restriction on a petitioner's ability to have his claim heard on the merits; instead, AEDPA recognizes that timeliness involves a "fact-intensive" inquiry," Pet. App. A43 (Silverman, J., dissenting), which requires a case-by-case analysis of the applicability of statutory defenses to the limitation period.[3] *See* 28 U.S.C. § 2244(d)(1). That inquiry will inevitably lead to determinations allowing claims that at first blush appeared to be time-barred.

Ford in essence argues that AEDPA's limitation period in itself constitutes an unreasonable impairment. Yet as this Court observed in *Felker v. Turpin*, 518 U.S. at 664, "[W]e have long recognized that 'the power to award the writ by any of the courts of the United States, must be given by written law,' * * * and we have likewise recognized that judgments about the proper scope of the writ are 'normally for Congress to make.'" *Cf. Slack v. McDaniel*, 529 U.S. at 486-88 (*re-filing* of second habeas petition permitted where prior, mixed habeas petition was dismissed under *Rose v. Lundy*, because prior petition treated "as though it had not been filed"); *Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-44 (1998) (competence-to-be-executed claim that was dismissed as "premature" was not barred from *re-filing* as second or successive petition when "ripe").

F. *Rose v. Lundy* Does Not Require District Courts To Provide Advisements Prior To Dismissal Of Mixed Petitions

1. Ford contends the Ninth Circuit's advisement requirement regarding the stay of mixed petitions was appropriate, purportedly because it "simply implement[s] what

3. Ford's assertion that "'a dismissal of a first habeas petition * * * would bar the prisoner from ever obtaining federal habeas review,'" Resp't Br. 24 is therefore incorrect.

this Court *already* requires." Resp't Br. 27 (emphasis in original); *see also* NACDL Amicus Br. 28. According to Ford, *Rose v. Lundy* itself mandates that "a prisoner be given '*the choice* of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court.'" *Id.* (emphasis in original).

What *Rose v. Lundy* actually provides, however, is that "a district court must dismiss * * * 'mixed petitions,' *leaving* the prisoner with the choice" referred to above. 455 U.S. at 510 (emphasis added). Nowhere in *Rose* is there any mention of advisements; instead, *Rose* and its progeny contemplate the summary dismissal of mixed petitions. Thus, despite Ford's complaint that the Warden's interpretation "[f]orc[es] pro se prisoner litigants to make a choice, without any corresponding information relative to that choice," Resp't Br. 28, this Court has approved of such a procedure for over twenty years.[4]

2. The Ninth Circuit's requirement of a limitation-period advisement is similarly unmeritorious. According to Ford, the panel "merely requires the district judge to notify a pro se plaintiff of the existence of the AEDPA limitation and the fact part or all of the period, whichever is the case, has already run, a relatively simple task." Resp't Br. 32-33. Yet as the dissent below noted:

> * * * This argument fails to take account of the fact that the district judge will almost never be able to tell, solely from the face of the petition, that the statute of limitations has expired. The calculation of the limitations deadline requires the examination of

4. Thus, the dismissal of mixed petitions does not amount to the unilateral re-characterization of a pleading, but instead constitutes the application of well-settled law. *Compare Castro v. United States*, 124 S. Ct. at 786.

> documents that rarely, if ever, accompany the petition. * * *

Pet. App. A42 (Silverman, J., dissenting).

Amicus NACDL suggests that "[a]nswering the statute of limitations question should require little additional work," purportedly because the district court is "already charged with determining whether each claim presented has been fully exhausted, a complicated question that requires review of the entire record of proceedings." NACDL Amicus Br. 22. Amicus misperceives the nature of exhaustion determinations in § 2254 cases. At the time motions to dismiss for failure to exhaust state-court remedies are considered, district courts generally do *not* have before them the entire record of proceedings, because consideration of that record is unnecessary to the determination of exhaustion. Instead, district courts compare allegations presented in documents filed in the state supreme court (i.e., petitions for review and/or petitions for writs of habeas corpus) against allegations set forth in the pending federal habeas petitions; lower court petitions that may have been filed will not be considered in that comparison (although they may affect tolling). *See Carey v. Saffold*, 536 U.S. 214, 221 (2002) ("California's collateral review system differs from that of other States in that it does not require, technically speaking, appellate review of a lower court determination"). The "entire record of proceedings" is lodged where a determination on the merits is warranted. Moreover, where exhaustion is at issue, timeliness typically is not. In fact, the record of proceedings was not lodged with the district court in this matter.

In *Diaz v. Sec'y for Dep't of Corr.*, No. 02-10114, 2004 U.S. App. LEXIS 4587 (CA11 Mar. 10, 2004), the Eleventh Circuit recently declined to apply the limitation-period advisement required by the Ninth Circuit in this case. The court recognized the "considerable burden" that would be placed on district courts if "they were required to assume the role of advocate for the *pro se*, parse the often hard-to-decipher

pleadings, and advise the *pro se* of all the potential risks of the requested action." *Id.* at *11 n.7; *see also Castro v. United States*, 124 S. Ct. at 795 (Scalia, J., concurring) ("[E]ven fully informed district courts that try their best not to harm *pro se* litigants by recharacterizing may nonetheless end up doing so because they cannot predict and protect against every possible adverse effect that may flow from recharacterization").

II.

"RELATION BACK," AS SET FORTH IN RULE 15(c) OF THE FEDERAL RULES OF CIVIL PROCEDURE, WOULD CONTRAVENE AEDPA IN HABEAS CASES

A. Rule 15(c) Is Not Applicable To Habeas Proceedings

1. Rule 11 of the Rules Governing Section 2254 Cases provides that "[t]he Federal Rules of Civil Procedure, to the extent that they are not inconsistent with these rules, may be applied, when appropriate, to petitions filed under these rules." Rule 11, foll. 28 U.S.C. § 2254. The Advisory Committee Notes to Rule 11 warn, however, that courts should not "rigidly apply [Federal Rules of Civil Procedure] which would be inconsistent or inequitable in the overall framework of habeas corpus."

Application of Rule 15(c), which permits relation back of amendments, would be inconsistent with the "overall framework" of AEDPA because, as set forth previously, AEDPA contemplates the dismissal of mixed habeas petitions under *Rose v. Lundy*. Where a mixed petition is dismissed in its entirety, *there is nothing to which any newly-exhausted claims can relate back. See Slack v. McDaniel*, 529 U.S. at 487-88 (holding an initial mixed petition that was dismissed should be treated "as though it had not been filed").

2. Even if it were assumed that unexhausted claims may be deleted from a mixed petition in lieu of complete dismissal, relation back would be inconsistent with AEDPA. Under relation back, where a habeas petitioner files a timely but mixed

federal petition containing just *one* exhausted claim, the unexhausted (and subsequently dismissed) claims alleged in the petition would also be considered timely (even if their pursuit in state court was *not*). The filing of a *federal* habeas petition would, for all intents and purposes, toll the limitation period. *Compare Duncan v. Walker*, 533 U.S. at 180. Relation back would eviscerate AEDPA's limitation period and reduce its state collateral-application tolling provision to mere surplusage. Indeed, Ford *himself* recognizes that AEDPA was designed "to promote the 'exhaustion of available *state* remedies — which is the object of § 2244(d)(2).'" Resp't Br. 39 (emphasis added).

3. Ford nevertheless contends that Rule 15(c) is applicable to AEDPA because, under 28 U.S.C. § 2242, habeas petitions "'may be amended or supplemented as provided in the rules of procedure applicable to civil actions.'" Resp't Br. 37; *see also* NACDL Amicus Br. 18. Section 2242 may not be read so broadly. In *Banks v. Dretke*, 124 S. Ct. 1256 (2004), this Court recently considered the applicability of Rule 15(b) (amendments to conform to the evidence) to federal habeas proceedings. Although this Court concluded that "[u]nder pre-AEDPA law, there was no inconsistency between Rule 15(b) and * * * defenses [based upon exhaustion and procedural default]" because those defenses "could be waived based on the State's litigation conduct," it noted that "AEDPA forbids a finding that exhaustion has been waived unless the State expressly waives the requirement * * * ." *Id.* at 1280. Thus, under *Banks v. Dretke*, it is arguable whether even Rule 15(b) would apply to AEDPA, because the amendment of a pleading to conform to newly-presented and unexhausted evidence could not be accomplished absent an express waiver of exhaustion. 28 U.S.C. § 2254(b)(3); *see also Mitchell v. Esparza*, 124 S. Ct. 7, 12 n.3 (2003) (*per curiam*) (unexhausted evidence introduced in federal habeas proceeding "ha[d] no bearing on the correctness of the [state court's] decision * * * *").

4. Even if it were assumed that federal habeas petitions may be *amended* to re-incorporate previously-dismissed claims,

however, relation back would not apply. As one court noted in discussing the interplay between amendment and relation back, "federal law treats amendment and relation back as raising separate issues." *Pessotti v. Eagle Mfg. Co.*, 946 F.2d 974, 977-81 (CA1 1991) (finding relation back properly denied even though amendment was granted, in part because plaintiff could have discovered the facts alleged in the amendment prior to the time the initial complaint was filed).

5. Finally, Rule 15(c) by its very terms applies only to "[a]n amendment of a *pleading*." (Emphasis added). Because Ford's second set of federal habeas petitions did not constitute "amendment[s]" of the first, but were instead separate and distinct proceedings, relation back would not be appropriate in this case under *any* circumstances. *See Neverson v. Bissonnette*, 261 F.3d 120, 126 (CA1 2001); *see also Newell v. Hanks*, 283 F.3d 827, 834 (CA7 2002); *Marsh v. Soares*, 223 F.3d 1217, 1219-20 (CA10 2000); *Warren v. Garvin*, 219 F.3d 111, 113 (CA2 2000); *Nyland v. Moore*, 216 F.3d 1264, 1266 (CA11 2000); *Jones v. Morton*, 195 F.3d 153, 160-61 (CA3 1999).

III.

REMAND FOR RECONSIDERATION OF EQUITABLE TOLLING IS UNWARRANTED

A. The Ninth Circuit Did Not Rely Upon Equitable Tolling To Reach Its Holding

Ford and amicus NACDL both urge this Court to remand this matter for consideration of "equitable" tolling of AEDPA's limitation period. *See* Resp't Br. 45-46; NACDL Amicus Br. 29-30; *see also* Mot. for Leave to File Br. and Br. of Federal Defenders in the Ninth Circuit, *passim*. Yet the majority below expressly noted that it did not "reach [that] question here," and reiterated, "[B]ecause we grant Ford relief on statutory grounds, we do not resolve any equitable tolling claim here." Pet. App. A35 n.15. Indeed, as the dissent observed, equitable tolling was not raised in the district court, or "even after [the panel] invited

supplemental briefing." *Id.* at A45. In fact, Ford did not raise this issue in his brief in opposition to the Warden's petition for writ of certiorari. Remand for reconsideration of that issue would be unnecessary and inappropriate.[5]

B. Reversal Would Render The Panel's Dicta Regarding Equitable Tolling Moot

The Ninth Circuit remarked that, had the issue of equitable tolling been before it, it would have concluded that the district court's failure "properly and fully to inform Ford about his options with respect to the mixed petitions and in misleading him as to the legal effect of a dismissal of his petitions [would constitute] 'extraordinary circumstances' beyond Ford's control that would require equitable tolling of AEDPA's statute of limitations." Pet. App. A35 n.15.

Should this Court determine, however, that reversal is warranted either because no advisements were necessary or because the advisements given were adequate, the basis of the majority's conclusion would be rendered moot. Under those circumstances, "remand to give the Ninth Circuit an opportunity to rule on the issue [of equitable tolling]," Resp't Br. 46, would amount to a meaningless gesture.

C. Equitable Tolling May Not Be Applied To The AEDPA Limitation Period

The panel's conclusion that equitable tolling applies to AEDPA is inconsistent with this Court's rationale in other cases. In *United States v. Beggerly*, 524 U.S. 38 (1998), this Court held that equitable tolling was not available as to the Quiet Title Act, 28 U.S.C. § 2409a, because Congress had already accounted for equitable tolling by "providing that the statute of limitations will not begin to run until the plaintiff

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5. The applicability of equitable tolling to AEDPA is squarely presented by the petition for writ of certiorari filed in *Adams v. Brambles* (No. 03-357), currently pending in this Court.

'knew or should have known of the claim of the United States,'" and, that under those circumstances, "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute." *Id.* at 48.

Similarly, this Court in *Lampf v. Gilbertson*, 501 U.S. 350 (1991), held that Congress did not intend the statute of limitation of 15 U.S.C. § 78j(b), pertaining to the Securities and Exchange Commission, to be equitably tolled. *Id.* at 363. This Court reasoned, in part, that "[t]he 1-year period, by its terms, begins after discovery of the facts constituting the violation, mak[ing] tolling unnecessary." *Id.*; *see also United States v. Brockamp*, 519 U.S. 347, 351-52 (1997); *cf. Lonchar v. Thomas*, 517 U.S. at 316 ("[T]his Rule, not some general 'equitable' power to create exceptions to the Rule, should have determined whether or not the petition's dismissal was appropriate").

Like the statutes at issue in *Beggerly* and *Lampf*, AEDPA already contains a provision in § 2244(d)(1)(D), "which postpones the running of the one-year limitation for the filing of a petition for habeas corpus to 'the [earliest] date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.'" *Taliani v. Chrans*, 189 F.3d 597, 598 (CA7 1999). Furthermore, Congress detailed two other equitable conditions for enlarging the period and also specified prerequisites for statutory tolling. See 28 U.S.C. § 2244(d)(1)(B), (C), (2). As the First Circuit recently explained in questioning the applicability of equitable tolling under AEDPA, "AEDPA reflects Congress' view that the courts were being too generous with habeas relief and that the whole system needed to be tightened up." *David v. Hall*, 318 F.3d 343, 346 (CA1 2003); *see also Taliani v. Chrans*, 189 F.3d at 598 ("Given this and other express tolling provisions (28 U.S.C. §§ 2244(d)(1)(B), (C), (2)), it is unclear what room remains for importing the judge-made doctrine of equitable tolling").

Accordingly, extension of AEDPA's one-year limitation period by equitable tolling would be "unwarranted," *see United States v. Beggerly*, 524 U.S. at 49, and "unnecessary," *see Lampf v. Gilbertson*, 501 U.S. at 363.

CONCLUSION

For these reasons and those stated in the Warden's opening brief, the judgment of the court of appeals should be reversed.

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